

No. 11907

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN R. QUINN, County Assessor, and H. L. BYRAM,
County Tax Collector, of Los Angeles County,
Appellants,

vs.

AERO SERVICES, INC., a corporation, debtor,
Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Appellee has no objection to the statement of the case as set forth in Appellants' Opening Brief.

ARGUMENT.

Appellee's Reply to Appellants' Point I.

Appellants' argument under this point may be summarized as an effort to cloak the County Assessor with the raiment of a judicial officer and the County Board of Equalization with the title "Judicial tribunal" and after assuming these premises to be proven to rely on a plea of *res adjudicata* by a *quasi* judicial tribunal after exclusive jurisdiction of the bankruptcy court had attached, and then point to *Arkansas v. Thompson* as decisive of the question.

Appellee submits that the defense of *res adjudicata* is a personal defense that the party asserting it is required to submit the plea as a defense, and if the defense is entertained by the judicial tribunal to whom the plea is made it then operates as a bar to the action. The doctrine being a defense does not deprive the tribunal of jurisdiction but on the hearing if the trial tribunal finds all of the essential elements to exist the defense then defeats the petitioner's cause, on the other hand if any of the essential elements are lacking the defense fails. The trial tribunal to which the plea is made determines the issues as in any other case.

The jurisdiction of the referee in bankruptcy is not acquired or lost by the plea of *res adjudicata* as a legal defense, but like all personal defenses, the trial tribunal determines the plea on the facts and law and renders a decision on the merits.

Jurisdiction of the bankruptcy court exercised through the Referee in Bankruptcy is conferred by the Bankruptcy Act Section 64(a) Sub. 4, 60 Statutes 330, 11 U. S. C. A. Section 104a(4) which provides,

“* * * taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *and provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court;”

Taylor v. Sternberg, 293 U. S. 470, 55 S. Ct. 260 where the rule is stated as follows:

“Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and exclusive; and thereafter that court’s possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual.”

The plea of *res adjudicata* or as termed by appellants a “Valid *Quasi* Judicial Determination,” has been set up in Appellants’ Answer [Tr. 23, 24].

The Referee in Bankruptcy has not determined the facts in respect to this defense but the interlocutory order that determined he had jurisdiction, so to do, was reviewed and thereafter appealed to this court.

Appellee submits that the defense of a final “Valid *Quasi* Judicial Determination” cannot be urged as a defense as a matter of law until the Referee in Bankruptcy determines by proper findings and order the following essential elements of *res adjudicata*, to-wit:

(a) Is the County Assessor or the County Board of Equalization a judicial tribunal.

(b) Was there a hearing or waiver of hearing had as required under the doctrine of Due Process.

(c) Did the right to determine the question pass to the Bankruptcy Court on the filing of the petition.

(d) Did the Bankruptcy Court have exclusive jurisdiction to determine the question on the filing of the original petition.

(e) Has there been a final determination by a judicial tribunal that the Bankruptcy Court is required to give full faith and credit.

Since counsel for Appellants admit under Argument Point I, pages 14 and 15 of Sub. B of Appellants' Brief:

“From the foregoing recital of the California assessment procedure it is apparent that the Assessor may act judicially within the meaning of the Arkansas decision (*Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 143-144, 61 S. Ct. 888, 85 L. Ed. 1244), in that he may hold hearings in arriving at his assessed valuations. However, he is not compelled to do so and *there is nothing in the record to indicate that he did so in the present case, in view of the fact that such a hearing was apparently made unnecessary by reason of his acceptance of the Debtor's declared valuation. Consequently we do not argue that the County Assessor here acted judicially within the meaning of the Arkansas rule, although he obviously did so within the broad meaning of the term 'judicial.'* (*Siebe v. Superior Court* (1896), 114 Cal. 551, 552, 46 Pac. 456; 3 Cooley, Taxation (4th Ed. 1924), Sec. 1143, p. 2296.)”

there is nothing in the record before the court to indicate a judicial determination by the Assessor or County Board of Equalization, then the question as to the powers and jurisdiction of the *quasi* judicial tribunal becomes moot.

Reply to Appellants' Point II.

Since counsel admits the record is bare of any determination by the alleged “*Quasi Judicial Tribunal*,” the argument on the finality and jurisdiction of the County Board of Equalization is irrelevant. Counsel for Appellants might have discussed the jurisdiction of the Superior

Court and the finality of its judgments, but until a judgment of that court was offered in evidence and the essential elements to establish *res adjudicata* were proven, the point of jurisdiction and finality are immaterial.

Reply to Appellants' Point III.

In arguing this point Appellant has assumed the unproven premise that there has been a final judicial determination by a tribunal of competent jurisdiction and that the Bankruptcy Court is required to give full faith and credit to the determination under the Appellants' plea of *res adjudicata*.

Appellants rely on two Supreme Court cases, *Arkansas v. Thompson*, and *Gardner v. N. J.* We feel those cases have no bearing on the question here for the reason that both decisions were based on evidence showing all the element of a defense of *res adjudicata*. In the *Arkansas* case the Railroad Commission was held to be a *Quasi* Judicial tribunal, the debtor invoked its jurisdiction, a trial was had and a final order was entered, the trustee submitted to jurisdiction and after having had his day in court tried to retry the matter before the Bankruptcy Court and ask that court not to give full faith and credit to a final order of a tribunal that had jurisdiction.

In *Gardner v. N. J.* we have the Supreme Court pointing out that the jurisdiction of the Bankruptcy Court is exclusive but it should be exercised in accordance with law, and on similar facts as the law is stated in *Arkansas v. Thompson*.

Appellee's Position.

Appellee submits that the well prepared and able decision of Judge O'Connor [Tr. 62 to 79], clearly defines the issues and distinguishes the cases upon this question. The Bankruptcy Court has the duty and power to determine the amount and validity of tax claims. See *State of New Jersey v. Anderson*, 203 U. S. 483, 17 A. B. R. 63, 27 S. Ct. 137.

Gardner v. New Jersey, 328 U. S. 850, 329 U. S. 565, 91 L. Ed. Adv. P. 410 (1-20-47);

Lyford v. State of New York, 137 F. (2d) 782;

Monongahela Rye Liquors, Inc., 141 Fed. (2d) 864.

In determining the question, the Bankruptcy Court determines the defense of *res adjudicata* on the evidence and law applicable to such a defense, and if any of the elements are lacking can deny the same.

This appeal is an effort to avoid a trial on the merits before a court of competent jurisdiction, and the urged technical ground is based on a plea of *res adjudicata* which counsel admits the tribunal, to-wit: the Assessor, did not act judicially and there is no evidence to support a finding on the plea of *res adjudicata*.

Appellee submits the Order appealed from should be affirmed and that the law is correctly stated in the decision of the lower court.

Respectfully submitted,

FRANCIS B. COBB,

Attorney for Appellee.